IN THE HIGH COURT OF BOMBAY

CIVIL REVISION APPLICATION NO. 4 OF 2007

Mr. Anthony D'Sa
son of Mr. Valentino Antonio D'Sa,
major of age, unmarried,
residing at Billow, Mapusa, Bardez-Goa. .... Petitioner

V/s

1. Mrs. Daria Lino D'Sa e Dias,
wife of Mr. Casmiro Dias,
of major age, housewife;

2. Mr. Casmiro Dias,
of major age, married,
Both residents of P.O. Box 80336
Mombasa – Kenya, East Africa.

3. Mr. Albert Simon D'Sa,
son of late Mr. Pascoal Jeronimo D'Sa,
of major age, unmarried, storekeeper;

4. Mr. Alfredo Vincent D'Sa,
son of late Mr. Pascoal Jeronimo D'Sa,
of major age, unmarried,
Fitter/Welder;

5. Miss Isabella Deleta D'Sa,
daughter of late
Mr. Pascoal Jeronimo D'Sa,
of major age,
spinster, computer operator;

6. Mrs. Doneta Sabina D'Sa e D'Souza,
wife of James D'Souza,
of major age, housewife;

7. Mr. James D'Souza,
of major age, married,

8. Mrs. Ramina Flora D'Sa e Fernandes,
wife of Mr. Francis Fernandes,

of major age, housewife;

9. Mr. Francis Fernandes,
of major age, married;
All seven residents of 40 Ton Bridge,
Cresent, Kenton Middlesex, U.K.

10. Mrs. Ruthy Valentina D'Sa e D'Souza,
wife of Mr. Rupert D'Souza,
of major age, housewife;

11. Mr. Rupert D'Souza,
of major age, married;
Both residents of 6488-54 Street NE,
Calgary Alberta, Canada 13J 175,
presently residing at Billow,
Mapusa, Bardez-Goa.

12. Mr. Valentino Antonio D'Sa,
(deleted as expired vide
Order dated 5/02/1983);

13. Shri Subhash R. Kalangutkar,
major, businessman and his wife;

14. Mrs. Supriya Subhash Kalangutkar,
major, housewife;
both r/o Xettia Vaddo, Mapusa,
Bardez-Goa.

15. Shri Laxman Vaikunt Tendulkar,
major, tailor and his wife;

16. Smt. Urmila Laxman Tendulkar,
major, housewife;
both r/o c/o Amrut Tailors,
near Music Factory, Tali Wado,
Mapusa, Bardez-Goa.

17. Shri Ramesh Bhakta,
c/o National Beverages,
Ambrocio Commercial Centre,
below Hotel Vilena, Mapusa-Goa. .... Respondents

Mr. Y.V. Nadkarni, Advocate for the Petitioner.
Mr. Nitin Sardessai, Advocate for Respondents No. 1 to 11.

CORAM : N.A. BRITTO, J.

DATE : 13th DECEMBER, 2007

JUDGMENT:

Heard learned Counsel on behalf of both parties.

2. Challenge in this Civil Revision Petition is to the judgment dated 01/02/2007 of the learned ADJ (Additional District Judge) bringing on record defendants no. 3 to 13 as legal representatives of the deceased plaintiff.

3. Some facts are required to be stated to dispose of this revision and for that the parties hereto are referred to in the names as they appear in the cause title of R.C.S. No. 227/82.

4. The plaintiff was the mother/mother-in-law of defendants no. 3 to 13. The plaintiff had filed the suit for declaration that the plaintiff along with defendants no. 3 to 13 be declared to be the owners of the suit property and that they were not bound by the sale deeds dated 10/11/1983 and 23/02/1987. The plaintiff had also sought mandatory injunction for the demolition of a structure constructed by defendant no.1. The defendants no. 3 to 11 were ordered to proceed ex-parte on 15/01/19992 and defendants no. 12 and 13

were ordered to proceed ex-parte on 19/04/1997.

5. The plaintiff died on 2/11/2004 and on 7/03/2006, the Court was informed about the death of the plaintiff.

6. On 28/03/2006, an application was filed on behalf of defendant no. 5 stating that defendants no. 3 to 13 were the only legal representatives of the deceased plaintiff and therefore they be transposed as plaintiffs no. 1(a) to 1(k).

7. On 6/07/2006 the defendants no. 14 and 15 filed an application to declare the suit as having been abated upon the death of the plaintiff, and, on or about 6/07/2006 the attorney of defendant no.5 filed another application to set aside the order to proceed ex-parte against defendants no. 3 to 13.

8. The learned trial Court by separate orders dated 22/08/2006 dismissed the said two applications dated 14/03/2006 and 6/07/2006. By the first order, the trial Court held that the application filed on 28/03/2006 for transposition was not maintainable as the heirs of the sole plaintiff were already on record and they were being proceeded ex-parte and the application to set aside the ex-parte order against them was already rejected and consequently the defendant no. 14 and 15's application dated 6/07/2006 was allowed and it was

held that the suit stood abated.

9. In the appeal filed, the learned ADJ observed that the defendants no. 3 to 13 were not residing in India and they might have not kept track of the suit and might have forgotten its existence and the plaintiff also had died in the United Kingdom and the plaintiff's Advocate did not know about the same. The learned ADJ therefore held that there were sufficient reasons to condone the delay and saw no reason as to why they should not continue as the legal representatives of the plaintiff and therefore proceeded to set aside the order of the trial Court dismissing the suit as abated.

10. Shri Nadkarni, the learned Counsel on behalf of the petitioner/defendant no.1 contends that Order 22, Rule 3, CPC required that any application to bring the legal representatives of deceased plaintiff was necessary to be made within the time provided by law and such an application not having been made, the suit had abated and therefore it was not open to the learned ADJ to transpose the said defendants in place of the deceased plaintiff.

11. On the other hand, Shri Sardessai, the learned Counsel on behalf of defendants no. 3 to 13 contends that the said defendants were already on record and all that was necessary was to file a formal application to transpose

them in place of the deceased plaintiff since they were already on record, in another capacity as defendants. Both the learned Counsel have placed reliance on various decisions to which I will refer to little later.

12. There is no dispute that the case at hand is a case of death of the sole plaintiff and is governed by Rule 3, Order 22, CPC and, which provides that *upon the death of sole plaintiff and if the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.* That is in brief what sub-rule 1 of Rule 3 of Order 22, CPC provides. Sub-rule 2 further provides that *where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff*. A reference to Rule 9 will also not be out of context, and, which provides that *where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action*. Sub-rule 2 of Rule 9 further provides that *the plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set*

aside abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. Sub-rule 3 further provides that the provisions of section 5 of the Indian Limitation Act, 1877, shall apply to applications under sub-rule (2). We would not be concerned with the explanation below sub-rule 3 of 9 of order 22 CPC.

13. The foremost case cited on behalf of the defendants no. 3 to 13, by their learned Counsel is the case of ***Mahabir Prasad V/s. Jage Ram & Ors. (1971 (1) SCC 265)*** which came to be distinguished by this Court in ***Dorothy C. Pereira V/s. Municipal Corporation & Anr. (1999 (1) LJ 659)*** on which reliance has been placed by Shri Nadkarni but was followed in ***Thoma Varkey etc. V/s. Krishnan Nair Narayanan Nair & Ors. etc. (AIR 1981 Kerala 228)*** on which reliance has been placed by learned Advocate Shri Sardessai, further contending that the case of ***Dorothy C. Pereira*** (supra) did not correctly follow the ratio of ***Mahabir Prasad*** (supra).

14. The facts of the case of ***Mahabir Prasad*** (supra) were different from the facts of the case at hand. In that case the plaintiffs i.e. Mahabir Prasad, his mother Gunwanti Devi and his wife Saroj Devi had obtained a decree against Jage Ram and two others (defendants) for the amount of rent due from them. Their application for execution was dismissed by the learned subordinate Judge, Delhi. Mahabir Prasad alone had preferred appeal to the

High Court against the order and had impleaded the other two plaintiffs namely Gunwanti Devi and Saroj Devi as party respondents. Saroj Devi died and the legal representatives were not brought on record within the period of limitation and her name was struck off from the array of respondents subject to all just exceptions. The High Court had dismissed the appeal on the ground that the appeal had abated in its entirety but Mahabir Prasad appealed to the Supreme Court and the Hon'ble Supreme Court held that where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act, the proceeding will not abate. In my view, on facts, the ratio laid down in the case of ***Mahabir Prasad*** (supra) was rightly distinguished by this Court in the case of ***Dorothy C. Pereira*** (supra), and, with respect, was not correctly followed in the case of ***Thoma Varkey etc.*** (supra).

15. The facts in the case of ***Naranlal Jethalal Thakkar & Ors. V/s. Shivprasad Achratlal Jani & Ors. (AIR 1940 Bom. 259)*** were again different from the facts of the case at hand. In that case the plaintiff had died leaving behind three sons and widow as heirs. Three sons were brought on

record. Widow had died and three sons on record were not described as heirs of their mother and it was held that the suit had not abated. In that context, the Division Bench observed that the words of the rules require an application to be made to cause a legal representative of a deceased plaintiff or defendant to be made a party, and as already pointed out, a person who is already a party cannot be made a party over again. The learned Division Bench therefore held that there was no justification for enlarging the words of Order 22, Rule 3, so as to cover a case where all that is required is formal amendment of the record, and not the addition of new parties.

16. Needless to observe, a case is a precedent for what it decides and not for what logically flows from it.

17. In the case of ***Mr. Jayaram Reddy & Anr. V/s. Revenue Divisional Officer & Land Acquisition Officer, Kurnool (1979 (3) SCC 578)*** there was cross appeals preferred against a common decree. The parties were arrayed in rival positions. In that context, the apex Court held that where one party as appellant dies and his legal representative are brought on record, though those very legal representatives are not substituted in his place which he adopted as respondent in the cross-appeal, the cross-appeal would not abate. The apex Court further held that the basic principle underlying Order 22, Rule 3 and 4 is the *audi alteram partem* rule. Therefore, the anxiety of the

Court should be whether those likely to be affected by the decision in the proceeding were before the Court having full opportunity to canvass their case. The apex Court further observed that keeping this objective in view it is now settled that if some legal representatives are before the Court, or they are before the Court in another capacity or are brought on record at some stage of the suit, the action will not abate even if there is no strict compliance with the requirements of Rules 3 and 4.

18. In the case of ***Mithailal Dalsanagar Singh & Ors. V/s. Annabai Devram Kini & Ors. (2003 (4) MHLJ 721)*** relied upon by the learned Advocate Shri Sardessai, the apex Court held that in as much as the abatement results in denial of hearing on the merits of the case, the provision of abatement **has to be construed strictly**. But the prayer for setting aside the abatement and dismissal consequent upon the abatement, have to be considered liberally. A simple prayer for bringing legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement and so also a prayer for setting aside abatement as regard one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. There can be no quarrel with the said legal propositions as framed by the apex Court.

19. In ***Dorothy C. Pereira*** (supra) very much like the case in hand, one Dorothy C. Pereira had filed a suit to challenge an auction sale and the suit had her sons added as defendants no. 16 to 21. Plaintiff Dorothy C. Pereira died on 11/02/1998 and defendant no. 19 was sought to be transposed because he was advised that when the legal representatives of the deceased are already on record, in the event the plaintiff dying, the suit did not abate. It was contended before this Court that since the suit was filed by the said Dorothy C. Pereira not only for herself but also on behalf of her sons, the said defendants no. 16 to 21 and, defendants no. 16 to 21 being already on record, the provisions of Order 22, Rule 2, CPC would apply and all that the Court was required to do was only to take a note of this fact and transpose defendant no. 19 to the array of plaintiffs and proceed with the suit and it was further contended that no application for that purpose was necessary. It was further contended that in terms of Order 22, Rule 3, CPC, in case it applied the Chamber Summons made by defendant no. 19 to transpose him as plaintiff was sufficient since all the legal representatives are already on record and there being no question of abatement of a suit and therefore it was not necessary for defendant no. 19 to make an application within the prescribed time. Repelling the contention, this Court held that the case was not covered by Order 22, Rule 2, CPC. The Court further observed that in that case, like in the case at hand, there was a sole plaintiff and therefore the case was covered by Rule 3, Order 22, CPC and further held that after the

death of the sole plaintiff, the application to bring legal representatives was necessary and such application, would therefore be governed by Article 120 of Limitation Act. If such an application is not made within the prescribed time, Article 121 of the Limitation Act would come into play and then the legal representative has to make an application for setting aside the abatement if necessary to seek condoning of delay in that behalf. The Court therefore held that the aforesaid provision applied to the facts of the case and it was incumbent upon defendant no.19 to have made an application within 90 days as prescribed under Article 120 of the Limitation Act and such an application having not been made, the suit abates without any specific order in that behalf. Any application for setting aside that abatement ought to have been made within 60 days under Article 121 of the Limitation Act and if that could not be done then it was necessary for the Applicant to show sufficient cause and seek condonation of delay in making such an application under Article 121 of the Limitation Act. This Court then referred to ***Mahabir Prasad*** (supra) and came to the conclusion that the said decision proceeded totally on different footing and did not support the proposition canvassed on behalf of the said defendant no.19. The contention of defendants no. 3 to 13 that the judgment in the ***Dorothy C. Pereira*** (supra) was rendered incurrium cannot be accepted. It was rendered after considering the implications of what the apex Court had observed in the said case of ***Mahabir Prasad*** (supra) and as already stated, I have my respectful agreement with the case of

Dorothy C. Pereira (supra) apart from the fact that otherwise also it needs to be followed.

20. In ***Union of India V/s Ram Charan (dec.) through Legal Representatives (1964 SC 215)*** on which reliance has been placed on behalf of the defendant no.1, the Apex Court speaking through three learned Judges has held that Rules 3 and 4 of Order 22, CPC, lay down respectively the procedure to be followed in case of death of one of several plaintiffs when the right to sue does not survive to the surviving plaintiffs alone or that of the sole plaintiff when the right to sue survives or of the death of one of several defendants or of sole defendant in similar circumstances. The procedure, requires an application for the making of legal representatives of the deceased plaintiff or defendant a party to the suit. It does not say who is to present the application. Ordinarily it would be the plaintiff (or his heirs?) as by the abatement of the suit the defendant stands to gain. However, **an application is necessary to be made for the purpose** (emphasis supplied). If no such application is made within the time allowed by law, the suit abates so far as the deceased plaintiff is concerned or as against the deceased defendant. As stated in ***Nehra Chits (P) Ltd. V/s. B. Ramachandra Reddy & Ors. (AIR 2003 AP 486)*** the limitation for filing an application for setting aside the abatement starts from the date of death of the party and not from the date of knowledge of his death. Admittedly, the plaintiff died on 2/11/2004 and the

suit got abated after the expiry of 90 days therefrom. As stated by the apex Court in ***Mithailal Dalsanagar Singh*** (supra), once the suit abates as a matter of law, it is not necessary to have a order passed on record dismissing the suit as abated. Certainly, the legal representatives of deceased plaintiff could have moved an application to seek the abatement set aside and that had to be done in the next 60 days and if not within further period by explaining the delay in filing such application. If the suit had abated after 90 days of the death of the plaintiff on 2/11/2004, there was no question, in my opinion, of filing any application for transposition of the said defendants no. 3 to 13 in place of the deceased plaintiff. The matter of transposition is dealt by Order 1, Rule 10, CPC which is a general remedy. The specific remedy is provided by Order 22, Rule 3, CPC, and, once a specific remedy is provided then only that remedy could have been followed. Defendants no. 3 to 13 were already proceeding ex-parte by virtue of orders dated 15/01/1997 and 19/04/1997. The said defendants filed an application for the first time on 14/03/2006 to transpose them in place of deceased plaintiff and after realizing that they were already being proceeded ex-parte they filed another application dated 6/07/2006 for recalling the order proceeding ex-parte against them. The said defendants did not even file any application for condoning the delay and only made a casual statement that in case there was delay, the same be condoned. No doubt sufficient cause in condoning delay has always been construed liberally but certainly casual approach cannot be countenanced. At the cost

of repetition it may be stated that after the suit had abated there was no question of defendants no. 3 to 13 being transposed in the name of the deceased plaintiff. Likewise, there was also no question of setting aside any ex-parte order. The only remedy provided for bringing the legal representatives of deceased plaintiff was by way of an application to set aside the said abatement in terms of sub-rule 2 of Rule 9, Order 22, CPC and in case there was delay in making such an application, by filing an application in terms of sub-rule 3 read with section 5 of the Limitation Act, 1963. The defendants no. 3 to 13 chose not to avail of the said remedy provided to them. No application for transposition could have been entertained after the suit had abated. Procedural laws are as valid as any other law and are not meant to be brushed aside by the Court. The provision fixing a particular time for making an application for bringing legal representatives on record with the consequence of the suit or appeal abating if no application is made within time, have been enacted for expeditious disposal of cases in the interest of proper administration of justice. It is further to be borne in mind that when a suit or an appeal abates, a very valuable right accrues to the other party and such a right is not to be ignored or interfered with lightly in the name of doing substantial justice to the party, as depriving a party of a lawful right created in the interest of administration of justice in the absence of good grounds results in injustice to the party concerned.

21. In above view of the matter, this revision petition deserves to succeed and the order dated 1/02/2007 of the learned ADJ deserves to be set aside and the order of the trial Court dated 22/08/2006 hereby is restored.

N.A. BRITTO, J.

NH/-